



January 4, 2002

Mr. William S. Helfand
Magenheim, Bateman & Helfand
3600 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2002-0058

Dear Mr. Helfand:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156859.

The City of La Porte (the "city") received a request for records regarding "employment, civil service, training, internal affairs, and disciplinary records" of named individuals, and records relating to "city policies, procedures, and protocol that applied to police department personnel between January 1, 2000 and August 1, 2000." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (13), (15). The submitted materials include a completed internal affairs investigation, completed employee evaluations, job descriptions and the city personnel manual. The completed investigation and the completed evaluations are subject to required release under section 552.022(a)(1). The personnel manual is subject to required release under section 552.022(a)(13), while the job descriptions fall within the scope of subsection (15) of section 552.022(a). The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law.

You contend that section 552.103 of the Government Code makes this information confidential. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general).

You also claim that section 552.101 excepts the information at issue from public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code applies to civil service cities and contemplates two different types of personnel files, one that the civil service director or the director's designee is required to maintain as part of the police officer's civil service file (the "(a)" file), and one that the department may, but is not

required to, maintain for its own internal use (the "(g)" file). Local Gov't Code § 143.089(a), (g).

In addition to providing for the maintenance of a police civil service file, section 143.089 specifies what may be kept in that file:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

Information that section 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in a police department's internal file, as provided in section 143.089(g):

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by a city police department for its use and the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. As indicated above, however, in cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place "any letter, memorandum, or document relating to" the misconduct in the personnel file maintained under section 143.089(a). Such records contained in the (a) file are not confidential under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). We note the legislative purpose of section 143.089 as stated by the *City of San Antonio* court:

All parts of section 143.089 are quite obviously designed to work in harmony with each other and in harmony with the disclosure provisions of the [Public Information] Act under the general legislative policy that allegations of misconduct made against a police officer shall not be subject to compelled disclosure under the Act unless they have been substantiated and resulted in disciplinary action.

851 S.W.2d at 949. We understand you to argue that a portion of the submitted information may be maintained by the city under section 143.089(g) of the Local Government Code. Accordingly, we conclude that to the extent the documents in Exhibits C and D are maintained solely in the police department's internal personnel file, the information is confidential pursuant to section 143.089(g) and must be withheld from disclosure under section 552.101 of the Government Code. You further represent that the submitted information contained in Exhibits E - J is maintained in the city's civil service files. Consequently, we find that the information in Exhibits E - J can not be withheld under section 143.089(g).

You assert that the remaining portion of information otherwise subject to release under section 552.022 is excepted from disclosure pursuant to section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers,

and family member information of peace officers and of current or former officials or employees of a governmental body. Based upon our review of the submitted documents, we find that none of the information here at issue is excepted under section 552.117. Thus, the completed evaluations, job descriptions, and personnel manual must be released to the requestor. We have marked the job descriptions and personnel manual for your convenience. Along with the documents returned to you, we have enclosed lists of the page numbers of the completed evaluations that must be released.

We next address your section 552.103 argument for the remainder of the submitted information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the requestor is the Plaintiff in a pending lawsuit, Civil Action No. H-01-1806, in which the city is the Defendant. You further state that the individuals named in the request are also named as Defendants in the same lawsuit. You have provided this office with a copy of the Plaintiff's Original Complaint in that lawsuit. Based upon our review of the submitted records, we find that the information at issue is related to the pending litigation. The city may, therefore, withhold the marked information from public disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must withhold Exhibits C and D under section 552.101 in conjunction with section 143.089. The city may also withhold certain marked information under section 552.103. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 156859

Enc. Submitted documents

c: Mr. Eric Baumgart
P.O. Box 1467
Kemah, Texas 77565
(w/o enclosures)